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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 275

STELLA J. CARTER,
ALFRED P. GOODLET,
Petitioners.

v.

KATHERINE SIMPSON, Executrix of the Last Will of George L. Laux, Deceased,
NATIONAL MALLEABLE AND STEEL CASTINGS COMPANY,
Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

Petitioners, Stella J. Carter and Alfred P. Goodlet, respectfully submit this brief in support of their petition, seeking issuance of writ of certiorari to the United States Court of Appeals for the Seventh Federal Judicial Circuit.

STATEMENT OF FACTS

While the facts in this case are set forth in some detail in pages 3 to 5 inclusive of the petition, they are here briefly summarized as a matter of convenience to the Court. Such facts were stipulated in the District Court,

the dispute in question being as to their legal effect, since there was no substantial disagreement between the parties as to what occurred and when.

The facts as stipulated are in substance that one James Goodlet died testate, a resident of Marion County, Indiana, in the year 1894, his will being admitted to probate and his estate being administered and ultimately closed in what is now the Marion Probate Court of Marion County, Indiana, the court of record having full jurisdiction in probate and certain other matters, including the construction of the terms and conditions of wills. Decedent Goodlet, by his will, bequeathed to his three children certain shares of stock owned by him in the National Malleable and Steel Castings Company. It is petitioners' position that it was the intent and purpose of said testator, James Goodlet, as stated in his will, that his children, including Lillian B. Goodlet Laux, take only a defeasible interest in and to certain of his personal estate, including certain shares of stock in the National Malleable and Steel Castings Company, and that if any of said children died without issue, all of the right, title and interest of said child (Lillian B. Goodlet Laux) or their estate would thereupon terminate and cease and all their right, title and interest in and to said property (shares of stock in National Malleable and Steel Castings Company) would go to the surviving sister or brother.

No question of minority or legal disability on account of minority of any of the children is here involved.

One child, Lillian B. Goodlet Laux (Lillie) died in May, 1942, without issue, a resident of the State of Washington, and her surviving husband, George L. Laux, was appointed the administrator of her estate in the Superior Court of King County, State of Washington. Upon the death of Lillian, without issue, petitioners herein made claim to

the shares that she had held. The shares had considerably increased in number over the years by virtue of stock dividends and recapitalization of the issuing corporation.

On November 16, 1942, Alfred P. Goodlet filed suit in Marion Probate Court to construe the will of his father, James Goodlet, making George L. Laux, the surviving husband and administrator of Lillian B. Goodlet Laux's estate, defendant and gave notice by publication and by sending said Laux by United States mail a copy of the complaint, receipt of which copy was acknowledged by Laux's counsel.

While such suit was pending in Marion Probate Court, George L. Laux died, a resident of the State of Montana, leaving heirs, all of whom were unknown to plaintiff Goodlet, who, upon the death of George L. Laux, amended the complaint then pending in Marion Probate Court to construe the will, naming as defendants the unknown heirs of said Laux, giving notice to such unknown heirs by publication, under Section 2-807, *Burns' Indiana Statutes*, which reads as follows:

> "The Clerk, by order of the court, if in session, or in vacation without such order, shall cause a notice of the pendency of any action, and the term at which the same will stand for trial, to be published once each week for three (3) weeks successively, in some newspaper of general circulation, named by the plaintiff or his attorney, printed in the English language, and published in the county, (or if none be printed or published therein, then in the county in this state nearest thereto in which any such paper may be printed) in either of the following cases as shown by affidavit:
>
> • • •
>
> Fourth. Where the residence of any defendant, upon diligent inquiry is unknown.

> Fifth. Where the name of any defendant is unknown, and he is believed to be nonresident."

At least one of the "unknown heirs", namely Katherine Simpson, an adult sister of George L. Laux, had actual knowledge of the proceedings but did not appear in the action in the Marion Probate Court. A default judgment was taken against them and decree entered by Marion Probate Court under date of June 26, 1947, construing James Goodlet's will and holding that under its provisions the shares of stock, upon the decease of Lillian without issue, became the property of petitioners herein and further holding that petitioners were entitled to have such shares transferred to them on the books of the corporation.

Katherine Simpson, an adult sister of George L. Laux, as above mentioned, was appointed Executrix of his will some months after the date of the decree entered in Marion Probate Court.

On April 26, 1949, Alfred P. Goodlet filed in the Superior Court of Marion County, Indiana, a suit seeking to mandate the corporation to issue to petitioners herein the certificates of stock represented by those in the possession of Lillian during her lifetime.

Upon the filing of such Superior Court action, the National Malleable and Steel Castings Company filed A Bill of Interpleader in the United States District Court for the Southern District of Indiana, making petitioners herein, together with Katherine Simpson, Executrix of the will of George L. Laux, defendants, and such proceedings were then had in such cause that the District Court rendered its judgment that these petitioners were the owners of such shares and that such shares became the property of Alfred P. Goodlet and Stella J. Carter and further holding that said parties were entitled to have such shares trans-

ferred to them on the books of the corporation. No appeal was ever taken from the decree of the Marion Probate Court nor was any action ever filed to set it aside or to vacate such decree.

The Court of Appeals reversed the District Court and the petition for writ which this brief supports, seeks review by this Court of the action of the Court of Appeals for the Seventh Circuit.

The Court of Appeals for the Seventh Circuit, in reversing the United States District Court for the Southern District of Indiana, apparently based its decision, speaking through Judge Major, on two points:

1.

That the subject matter of the Marion Probate Court proceedings was not the construction of the will but rather a dispute as to the ownership of the shares of stock formerly held by Lillian B. Goodlet Laux, deceased, and such being the case, that inasmuch as the certificates for the shares were not within the territorial limits of the Court, because of the further fact that the issuing corporation was not a domestic corporation of the State of Indiana, in consequence the Marion Probate Court did not have jurisdiction of the subject matter and therefore its judgment was void.

2.

That the Marion Probate Court did not have jurisdiction to construe the will of James Goodlet for the reason that the shares of stock devised by said will were not within the territorial jurisdiction of such Probate Court; therefore such judgment, or more correctly, decree, of the Marion Probate Court was void.

By way of parenthetical explanation, it should be said that the actual stock certificates in question were, at all times relevant to this proceeding, outside of the State of Indiana, being for a portion of the time in the State of Washington and a portion of the time in the State of Montana. They were subsequently tendered to the issuing corporation by Katherine Simpson, Executrix, with the demand that they be reissued to the heirs at law of George L. Laux and were thereafter deposited in the custody of the District Court by the issuing corporation at the time the Bill of Interpleader was filed and are still within the physical custody and possession of the United States District Court for the Southern District of Indiana.

AUTHORITIES

This Court nearly 90 years ago dealt with the question at issue in the case of *John F. Ennis v. J. B. H. Smith* reported in 55 U. S. 400-424, where this Court said:

> "For several hundred years, upon the Continent and in England from reported cases for a hundred years, the rule has been that *personal property in cases of intestacy is to be distributed by the law of the domicile of the intestate at the time of his death.* It has been universal for so long a time that it may now be said to be a part of the *jus-gentium.*"
>
> "Lord Thurlow speaks of it as such in the house of lords, in the case of *Bruce v. Bruce.* Erskine, in his *Institutes of the Law of Scotland,* B. 3, tit. 9, Sec. 4, 644, * says, (*425) this rule is founded on the laws of nations. He says: 'When a Scotsman dies abroad *sine animo remanendi,* the legal succession of his movable estate in Scotland must descend to his next of kin according to the law of Scotland; and where a foreigner dies in this country *sine animo remanendi,* the movables which he brought with him hither ought

to be regulated, not by the law of the country in which they locally were, but that of the proprietors *patria,* or domicile whence he came, and whither he intends again to return. This rule is founded in the law of nations, and the reason of it is the same in both cases, that since all succession *ab intestato* is grounded upon the presumed will of the deceased, his estate ought to descend to him whom the law of his own country calls to the succession, as the person whom it presumes to be most favored by the deceased.' "

* * *

"The earliest case reported in English books, is that of *Pipon v. Pipon,* Amb. 6, 27. Lord Hardwicke recognized in it the rule that the personal estate, in cases of intestacy, followed the person, and becomes distributable according to the law or custom of the place where the intestate lived."

The fact that in this case a will existed, while in the Ennis case an intestacy was involved, is irrelevant to the point at issue and so far as reported decisions of this Honorable Court are concerned, the quotation from the Ennis case is still the law.

Jurisdiction was conferred upon Marion Probate Court for the entry of the decree construing the will here in question by *Acts of 1907, Chapter 151 of the Indiana General Assembly, Burns' Statutes, Revised, Section 4-2910,* which reads in part as follows:

"Said Probate Court (Marion Probate Court) within and for the county for which it is organized, shall have original, exclusive jurisdiction in all matters pertaining to the probate of wills * * * ."

"and all other probate matters and shall have concurrent jurisdiction in the following matters: * * * 5th. Complaints to construe wills * * *."

It should be borne in mind that Marion Probate Court was also the court of original jurisdiction in connection

with the administration of the estate of James Goodlet, the owner, at his decease, of the stock here in question.

The following cases support the proposition that the subject matter of the proceeding in Marion Probate Court would be the construction of the will itself, rather than a determination of the ownership of the stock certificates:

Hogland v. Moore (1929), 219 Ala. 497, 122 So. 824 and 828;

Osburn v. McCartney (1887), 121 Ill. 408, 12 N. E. 72 and 73;

Hughes v. Hughes (1902), 30 Ind. App. 591, 593.

The case of *Erie Railroad Company v. Harry J. Tompkins*, 304 U. S. 78, decided by this Court in 1937, holds in part as follows:

> "Except in matters governed by the Federal Constitution or by Acts of Congress (not here involved) the law to be applied in any case *is the law of the state and whether the law of the state shall be directed by its legislature in statute or by its highest court in a decision is not a matter of Federal concern.*"
>
> (Our parenthesis and our emphasis)

In the case of *Hughes v. Hughes*, 30 Ind. App. 591, 593, it has been decided by the Appellate Court of Indiana that the subject matter before the Court was the will and not the certificates of stock.

Accordingly our position is that in view of the statutory law in the State of Indiana, and other case authorities above cited, it is a settled fact that a Federal Court of Appeals may not sit as an Appellate tribunal to modify, review or reverse a judgment of state courts, in this case the Probate Court of Marion County, Indiana.

It should also be borne in mind that the United States District Court for the Southern District of Indiana, on the stipulations and evidence introduced in the Bill of Interpleader, reached its conclusion and entered its findings in support of the decree of the Marion Probate Court.

The decision of the Court of Appeals for the Seventh Circuit entered March 7, 1952, reversing the District Court, is in direct conflict with the rule enunciated by this Court in *Erie Railroad Company v. Tompkins*, above, for the reason that in reversing the District Court, the Court of Appeals exercised its judgment independent of the law established in the State of Indiana, both by statute and by decision.

In the Erie case, this Court quoted further from Mr. Justice Holmes, referring to the case of *Kuhn v. Fairmount Coal Company* (1909), 215 U. S. 349, as follows:

> "The common law so far as it is enforced in a state, whether called common law or not, is not the common law generally but the law of the state existing by the authority of that state without regard to what it may have been in England or anywhere else. *The authority and only authority is the state and if that be so, the voice adopted by the State as its own (whether it be of its legislature or its supreme court) should utter the last word.*"
>
> **(Our emphasis)**

ARGUMENT

The Court of Appeals for the Seventh Circuit, in arriving at its decision, reversing the District Court, was compelled to go far afield and in fact decided the instant case in direct conflict with the holding of this Court in the *Erie* case. It is obvious that the Court of Appeals substituted as a fact or facts its judgment of conditions occurring in connection with this litigation which are outside the record in the instant case, which is manifest error on the part of such Court of Appeals.

We submit that the only matter which should be rightfully considered by the Court of Appeals was such as set forth in the official record certified to it by the Clerk of the United States District Court for the Southern District of Indiana.

On the basis of the facts so certified from the District Court and the supporting records it is clear beyond question that such District Court, in arriving at its conclusions and findings determining that the ownership of the shares of stock under a proper construction of the will of James Goodlet was rightfully vested in Stella J. Carter and Alfred P. Goodlet as surviving heirs of James, correctly determined the law and rightfully decided the question posed it by the Bill of Interpleader filed by the issuing corporation.

We submit further that the action of the Court of Appeals in overturning this finding and reversing the District Court constituted a departure from the accepted, usual course of judicial procedure, such as to call forth the exercise of this Honorable Court's power of supervision.

It may be said further in our opinion that if the findings and judgment of the Court of Appeals for the Seventh Circuit are permitted to stand without review by this Court, there has then been permitted by this Court a creation, of the rule of law which is a complete departure from and in direct contradiction from the doctrine enunciated by this Court in *Erie Railroad Company v. Tompkins;* that there was thereby created a condition which will cause great confusion and chaos in future determination and interpretation of wills in that a legal position is thereby created which will permit any individual who comes into possession of personal property constituting portions of the assets of the decedent's estate to remove such personal property physically from the jurisdiction of the state court probating and administering such will, and by virtue of such unlawful removal, or lawful, but removal in any case (if the decision of the Court of Appeals be permitted to stand), thereby render such state court helpless to order the distribution of such personal property either in accordance with the terms and conditions of a will or by operation of the law of the state in which the court be situated.

It is entirely possible, and we urge on this Court, highly probable, that under such circumstances the final settlement of any given estate would be rendered impossible.

We do not believe this to be the existing law or a practice which could or should be adopted by our courts and the litigants seeking the offices of such courts in the determination of questions as here involved.

Regardless of the value of the stock, which is substantial, we believe and urge upon this Court therefore, that because of the importance of this question and because of the disregard by the Court of Appeals for the Seventh Circuit of the rule of law in the State of Indiana, in violation of

such rule and in violation of the rule stated by this Court in the case of *Erie v. Tompkins* that certiorari should be granted, to the end that this cause may be reviewed by this Honorable Court.

Respectfully submitted,

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To: The Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States.

The respondent Katherine Simpson, Executrix of the Last Will of George L. Laux, Deceased, submits the following brief in opposition to the petition and brief heretofore filed by Stella J. Carter and Alfred P. Goodlet, petitioners, seeking a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

REFERENCE TO OFFICIAL REPORT BELOW

The opinion of the United States Court of Appeals for

the Seventh Circuit under consideration appears in 195 Fed. (2d) 8.

GROUNDS ON WHICH THE JURISDICTION OF THE COURT WAS INVOKED

The petitioners Stella J. Carter and Alfred P. Goodlet have sought to review this case by filing a joint petition for writ of certiorari. The petitioner Stella J. Carter, on the 14th day of July, 1952, filed a petition with this court requesting an extension of time for the filing of a petition for writ of certiorari. This respondent was informed that pursuant to such petition filed by Stella J. Carter an extension of time for filing such petition for writ of certiorari was granted to and including August 17, 1952. We were informed further that the petition for certiorari in question was filed within the time extended by this court.

However, we would call the special attention of the court to the fact that no petition for extension of time was filed for or on behalf of the petitioner Alfred P. Goodlet. No extension of time for filing of petition for writ of certiorari was granted on behalf of such petitioner Goodlet. In view of the fact that the petitioner Alfred P. Goodlet has not filed his petition for writ of certiorari within the ninety day statutory period, it would follow that this court does not have jurisdiction to consider this petition for writ of certiorari filed for and on behalf of Alfred P. Goodlet.

28 U.S.C.A., Sec. 2101.

The claims of the petitioners Carter and Goodlet are wholly distinct. Each petitioner claimed a one-half interest in the stock and dividends which were the subject of this law suit. Goodlet could have refrained from claiming his alleged interest when this case was initially filed in the District Court. Carter could have proceeded separately

with her claim. Thus here appears to be no reason why the court should consider the petition for writ of certiorari except as to Carter. Under the above statutory provision it would follow that this court has no legal authority to grant Goodlet's petition for writ of certiorari.

CONCISE STATEMENT OF THE CASE

The petitioners have set forth in their petition and brief a partial statement of the facts presented by this case. In addition it should be noted that the will of James Goodlet was probated in the Marion Circuit Court at Indianapolis, Indiana; that the final report in the estate of James Goodlet was approved and such estate closed by a decree of such Marion Circuit Court on September 27, 1898. This final report recited that pursuant to the will of James Goodlet certain common stock of the National Malleable and Steel Castings Company was transferred to Martha Goodlet, Guardian for her three minor children—Stella, Lillian and Alfred—each of said children receiving one-third of the shares of stock owned by their father James Goodlet. No reference was made in such judgment approving this executor's final report that the shares transferred to the Guardian were to be held in trust or restricted in any manner. On December 6, 1901, Martha Goodlet, as guardian, transferred absolutely and without any restrictions being indicated the shares of stock in question to her daughter Lillian, which action was confirmed by a judgment of the Marion Circuit Court. The other two children of James Goodlet, the respondents Carter and Goodlet, also received their shares of stock on October 4, 1900 and February 26, 1909, respectively. These last two transfers to the respondents were also without any restrictions being indicated and were confirmed by judgments of the Marion Circuit Court in connection with such guardianship proceedings. (Tr., pp. 139-141.)

Lillian Goodlet married George Laux. She moved to the State of Washington, where she died on May 26, 1942. At the time of her death she had registered in her name 942 shares of stock, which are the subject of this law suit. Her husband, George Laux, was appointed administrator of her estate by the court in King County, Washington. He took possession of such stock as administrator of her estate. He held the shares of stock in the State of Washington until August 11, 1944 when as administrator he filed his final report, which recited that he had transferred all of the assets of his wife's estate to himself as her sole heir. This final report was confirmed by a judgment of the King County Court of the State of Washington after due notice given pursuant to the laws of such state. The respondents, in addition, had actual knowledge of the fact that their sister's estate was being administered in Washington. (Tr., pp. 99-101.)

On November 16, 1942, shortly after Lillian's death, Goodlet filed suit in the Marion Probate Court to construe the will of his father James Goodlet. Notice by publication of this law suit was given. George L. Laux, individually and as administrator of the estate of Lillian B. Laux were named as defendants. No personal service was had at any time upon George L. Laux, individually or as administrator, or upon the heirs of George L. Laux, or Katherine Simpson as his executor. At no time during the pendency of this suit filed in the Marion Probate Court were the certificates of stock present in the State of Indiana. Such certificates were at all times present either in the State of Washington or Montana. The corporation issuing such certificates was organized and domiciled in the State of Ohio. A default judgment was thereafter taken against the respondent Carter and "the unknown heirs of George L. Laux, deceased." No one of such Laux heirs

was a resident of Indiana. This judgment was entered on June 26, 1947. (Tr., pp. 94-97.)

From December 6, 1901 when Lillian Laux received her shares of stock in question until the date of her death on May 26, 1942, she treated this stock as her own. She sold some shares; she bought additional shares from time to time, including certain shares from the respondent Goodlet. (Tr., p. 104.) There was no evidence that the respondents Carter or Goodlet objected to such action by their sister Lillian. On the contrary, Goodlet received his stock on February 6, 1909. In 1911 Goodlet sold all of his shares of this stock received from his father's estate. The respondent Carter over a period of time sold or pledged all her stock with the exception of 114 shares. The respondent Carter had no children; the respondent Goodlet did have children. For a period of more than forty years, the petitioners also treated this stock as their own. Not until Lillian died in 1942 was a question raised with respect to any qualifications as to the absolute ownership of such stock by each of the three children of James Goodlet. (Tr. pp. 146, 147; 139-140.)

ARGUMENT

The petitioners rely solely on the contention that the judgment of the Marion Probate Court is decisive of our law suit; that when the United States Court of Appeals for the Seventh Circuit decided that such Marion Probate Court judgment would not require a finding in favor of petitioners in this case, an erroneous result was reached. By way of answer, this respondent contends that the undisputed facts presented by this case would lead necessarily to the conclusion first that the Marion Probate Court judgment was not binding on Katherine Simpson, Executrix in this law suit and thus under the circumstances, the decision in question is correct. Katherine Simpson, Executrix, was never a party to the Marion Probate Court judgment. Such judgment purports to be a finding against "the unknown heirs of George L. Laux, deceased." As executrix, Katherine Simpson represents interest other than the heirs of George L. Laux. If this stock was turned over to Katherine Simpson, Executrix, the Fergus County, Montana Court would have the power to order her to sell such stock to pay creditors, taxes, or expenses in connection with the administration of the estate of George Laux. Under such circumstances the heirs would acquire no interest in such stock. Thus she was not in privity with the heirs of George L. Laux. It would follow that even a valid judgment against the unknown heirs of George L. Laux would not be binding on Katherine Simpson, Executrix.

American Jurisprudence, Executors and Administrators, Sec. 969.

Burns' Rev. Indiana Statutes 1933, Sec. 2-1062.

Furthermore, even if the respondent Goodlet had procured a judgment in the Marion Probate Court specifically against Katherine Simpson, executrix of the Estate of

George L. Laux, or against George L. Laux as the administrator of his wife's estate, such judgment would not be binding upon either of such parties. For, it must be remembered that Katherine Simpson was appointed executrix by a Montana Court; and George L. Laux was appointed administrator by a Washington Court. A foreign executor or administrator such as Simpson or Laux could not be bound by a judgment of a court in Indiana without their consent under well settled legal principles universally recognized in this country. Such a judgment entered by the Indiana Court would not bind Simpson, Executrix (or Laux, as Administrator), where no property was located in this state, even had such executrix (or administrator) voluntarily appeared in such law suit in the Marion Probate Court since no Indiana Court had appointed either as ancillary representative of the estates in question.

Burrowes, Receiver v. Goodman, Executor (1931), 50 Fed. (2d) 92;

Burns Rev. Indiana Statutes 1933, Sec. 6-305.

From the above it would follow that this Marion Probate Court judgment, even if otherwise valid, would not be binding on Katherine Simpson, Executrix. The Court of Appeals in the opinion in question was acting in accordance with (not reversing) Indiana law when it refused to recognize such judgment. The above reasons would sustain the Court of Appeals decision even though such Court did not elect to rest its decision on such legal propositions.

Can this Marion Probate Court judgment be justified as an action in personam? Such judgment involved a law suit seeking to construe a will which had been probated and the estate closed on September 27, 1898. In Indiana an action to construe a will is authorized only where there is ownership of some property to be determined.

Hawes v. Kepley (1901), 28 Ind. App. 306.

Since 1927 suits to construe a will have been provided for by the Indiana Declaratory Judgment Act Sec. 3-1102 Burns Revised Indiana Statutes, 1933. However, a later section of this Indiana Declaratory Judgment Act expressly provides: "No declaratory judgment shall prejudice the rights of persons not parties to the proceedings." Sec. 3-1111 Burns' Revised Indiana Statutes, 1933. Prior to the 1927 Declaratory Judgment Act, Indiana courts had general statutory authority to construe wills. Suits of this character were regarded as equitable in nature and in personam. Hawes v. Kepley (1901), 28 Ind. App. 306. If the action instituted by the respondent Goodlet in the Marion Probate Court was necessarily an action in personam then obviously it would be a nullity since neither Katherine Simpson, Executrix, nor anyone in any way connected with Lillian or George Laux's interest was served personally or appeared in such law suit.

In the case of Smoot v. Indemnity Ins. Co. (1945), 152 Fed. (2d) 667, a Federal Court refused to recognize an Illinois judgment based on constructive service. We believe that the observations of the court are pertinent to our question. In the opinion such court stated:

> "In our view, the decree of the Illinois Court of February 6, 1945, shows clearly and unmistakably on its face that that Court had no jurisdiction to enter this decree. Service on Ada Smoot, the defendant in that suit (appellee here) was by publication only, although it is not disputed that defendant was a non-resident with no property in Illinois which could be or was the subject of attachment. Admittedly, service by publication is not good in actions in personam on non-residents not found within the jurisdiction unless property of the party within the State be the subject of attachment. In order to cure this defect in the service, vital to its jurisdiction in the cause, the Circuit Court of Vermilion County, Illinois, made a finding that 'the suit involves a res within the jurisdiction of

this Court.' It is tacitly admitted that if the action were in personam the service was fatally defective.

But by tradition, equity is said to act only in personam and this principle is of nearly universal application. Thus, by the first test the Illinois proceeding was not in rem."

Can this Marion Probate Court judgment be sustained as an action in rem? The sole property involved was certain stock certificates. The record disclosed that the National Malleable and Steel Castings Company was made a party originally to the Marion Probate Court proceeding. Prior to the time that the default judgment was entered, the suit was dismissed as to such corporation. (Tr., p. 148.) The earlier decisions would hold that the only place where the stock had a situs would be the state of incorporation. Recently (particularly where Uniform Stock Transfer Acts have been enacted)* it has been decided that a state court would have jurisdiction of certificates which were present in the state where the court was sitting, even though such state was other than the domicile of the corporation issuing such certificates.

Direction, et al. v. U. S. Steel Corp. (1924), 267 U. S. 22.

But, we submit that no decision would go so far as to hold that a state court which did not have control of the stock certificate and which was not the state where the corporation was domiciled could enter a binding judgment in rem with respect to such stock certificates based solely on service by publication.

Thus, as the opinion of the Court pointed out in our case this Marion Probate Court judgment, can be neither sustained as a valid judgment in personam or in rem. It is

* Indiana adopted Uniform Stock Transfer Act in 1923. Burns' Ind. Statutes 1933, Sec. 25-701.

not entitled to full faith and credit in a Federal court. For as this court observed in Pennoyer v. Neff (1877), 95 U. S. 714, "If the non-resident has no property within the state there is nothing on which the tribunal can adjudicate."

> Calumet Trucking Co. v. Young (1941), 218 Ind. 468; 63 Harvard Law Rev. 657.

The petitioners make an effort to escape from the fact that the Marion Probate Court in rendering this judgment had neither jurisdiction of the person nor the property in dispute, by the suggestion that the res was the will of James Goodlet. The opinion of the Circuit Court pointed out that what the respondents Carter and Goodlet were after was not James Goodlet's will. They sought certain stock certificates and accumulated dividends. The respondents consistently ignore, by their argument and citations, the fact that this estate of James Goodlet had been closed for more than forty years. Under such circumstances how can it be seriously contended that the will of James Goodlet was the res which was the subject of this judgment? A reading of this Marion Probate judgment, as a whole, will show that this theory is entirely without substance.

In the case of Smoot v. Indemnity Insurance Co. (1945), 152 Fed. (2d) 667 an effort was made to escape a similar difficulty such as petitioners face. In the Smoot case there was an Illinois judgment which had been set aside by a later Illinois judgment in a proceeding where there was no personal service and no property in Illinois unless the first judgment was to be deemed a res. This federal court refused to accept such theory as a basis for upholding the second judgment which was rejected likewise.

The petitioners cite Erie Railroad Company v. Tompkins (1937), 304 U. S. 78. Certainly the Court of Appeals in the opinion in question sought solely to determine the

Indiana law applicable to the Marion Probate judgment and the other questions considered. The point involved in the Erie case, of a Federal court attempting to apply the law of some jurisdiction other than the particular state law applicable, has no possible relevancy to our case.

The petitioners argue that this Marion Probate judgment, irrespective of any defect, is not subject to collateral attack. Such an observation under Indiana law might be made of a voidable but not of a void judgment. Gavit "Indiana Pleading and Practice," Sec. 185 states:

> "In general it is now agreed that a record recital of jurisdiction in a default case is not necessarily conclusive. A court by a misstatement of fact may not create a jurisdiction which it does not have. This is true under the Full Faith and Credit Clause and also under the Due Process Clause. In view of the fact that the latter cause is applicable to a domestic judgment a state is not free to create judicial jurisdiction by a conclusive presumption, unless an exceptional basis for it can be found."

The petitioners also state on page 10 of their brief that "the Court of Appeals substituted as a fact or facts its judgment of conditions occurring in connection with this litigation, which are outside the record in the instant case." The record will disclose that all of the facts recited in the opinion of the Court of Appeals were admitted both in the pleadings and in a stipulation of fact admitted in evidence and agreed to by all the parties to this law suit (Tr., pp. 91-118). Thus it is obvious that this assertion is entirely erroneous. A reading of the petitioners' brief fails to disclose reference to a single instance wherein the Court of Appeals substituted "a fact or facts."

The opinion of the Court in question did not find it necessary to decide certain contentions raised by this respondent.

The record will disclose that there was a judgment of the Marion Circuit Court entered on September 27, 1898 whereby the stock claimed by the respondent was transferred to the guardian for Lillian Goodlet absolutely and without restriction. (Tr., pp. 139-140.) There was a second judgment of the Marion Circuit Court dated December 6, 1901 approving the guardian's action in transferring such stock to Lillian Goodlet absolutely and without qualifications. (Tr., p. 139.) In each of the above two judgments all of the parties were personally before the court, including the two petitioners herein. Again there was a judgment of the King County Court, State of Washington, dated August 11, 1944, closing the estate of Lillian Laux, which judgment provided that the assets of Lillian Laux's estate including the stock in question should be transferred to George L. Laux. (Tr., pp. 144-145.) While there was no personal service on the petitioners Carter and Goodlet, in such Washington proceedings, notice by publication pursuant to law of that state was given and the distinguishing fact (not present in connection with the Marion Probate judgment) is that the Washington Court did have jurisdiction of the stock certificates. Finally, there was involved waiver and estoppel wherein it was conceded that the two petitioners Carter and Goodlet together with their sister Lillian had treated, as their own, the stock received from their father's estate for approximately forty years. (Tr., pp. 139-140.) Goodlet admittedly sold all of his stock; Carter sold or pledged all of her stock with the exception of 114 shares. (Tr., p. 140.) A reading of the Court's opinion in this case would make it clear that the court felt that the petitioners herein were estopped to assert this claim under the circumstances. However, the Court did not deem it necessary to pass explicitly on this question. The Court did hold that James Goodlet's will did not provide that any of his three children should hold their stock subject to the

restriction suggested by petitioners. On such proposition the opinion of the Court of Appeals is supported by abundant Indiana authority.

Quilliam v. Union Trust Co. (1924), 194 Ind. 521.

Finally, the petitioners suggested that the effect of the Court of Appeal's decision will be to make it most difficult, if not impossible, to settle an estate involving stock certificates located outside of the jurisdiction of the court administering such estate. Once again, may we point out that we do not have a question involving the administration of an estate. This case involves a dispute over certain personal property, the ownership to which has been settled by a court order terminating an estate almost fifty years prior thereto. To hold with the petitioners that a party might go to a court wherein an estate had been closed many years and file a petition to construe a will in order to determine ownership of property not located in the court's jurisdiction, without personal service, would indeed make the ownership of property purchased through an estate most precarious.

The respondent, Katherine Simpson, Executrix, respectfully submits that this petition for writ of certiorari should be denied.

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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 275

STELLA J. CARTER,
ALFRED P. GOODLET,
Petitioners,

v.

KATHERINE SIMPSON, Executrix of the Last Will of George L. Laux, Deceased,
NATIONAL MALLEABLE AND STEEL CASTINGS COMPANY,
Respondents.

PETITIONERS' REPLY TO OPPOSING BRIEF OF RESPONDENT KATHERINE SIMPSON, EXECUTRIX

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NATIONAL MALLEABLE AND
STEEL CASTINGS COMPANY,
Respondents.

PETITIONERS' REPLY TO OPPOSING BRIEF OF RESPONDENT, KATHERINE SIMPSON, EXECUTRIX

To: The Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States.

JURISDICTION OF THIS COURT

As these petitioners understand the contention of Respondent Katherine Simpson, Executrix, she asserts this Court is without jurisdiction to grant writ of certiorari because Goodlet is not named as a petitioner in the petition for extension of time for filing petition for certiorari.

The omission of Goodlet's name as petitioner for extension of time was inadvertent and if we may be permitted to explain the situation—Goodlet was not a pauper, nor was he financially able to prosecute the petition for writ of certiorari alone. He was in ill health and had been for some years. He had been adjudged a dependent of his son who was a totally disabled veteran of World War II, and was receiving a pension under the Veterans' Administration with an allotment to the father. He was obliged to await the action of Mrs. Carter. When Carter was obliged to employ new counsel, it was necessary to obtain an extension of time and in the rush of preparation of the petition therefor Goodlet's name was inadvertently omitted.

However, as it has been held that a Supreme Court has inherent power to entertain a late appeal (Sweet v. State (1948), Ind. Sup. Ct., 81 N. E. (2d) 679 680), and this Supreme Court, in the case of Langiess v. Green (1931), 282 U. S. 531, 51 S. Ct. 243, held that upon a writ of error from an intermediate appellate tribunal this Court was not limited to a consideration of the points raised by the plaintiff but must enter the judgment which should have been rendered in the Court below on the record before it and

> "On certiorari * * * the entire record is before this Court with power to review the action of the Court of Appeals and direct such disposition of the case as that Court might have done upon the writ of error sued out for the review of the Circuit (now District) Court";

and the further fact that the time for filing of the petition for a writ of certiorari was extended and the petition filed within the time allowed, we respectfully submit respondent's contention that this Court does not have jurisdiction of this petition is not well founded.

The Circuit Court of Appeals in the case of Barrett v. Jaspen, 124 Fed. (2d) 1005, decided this question adversely to the contention of respondent Simpson.

These petitioners, therefore, respectfully submit that both because of the inherent power of this Court and because the petition for writ was filed within the time allowed by this Court, Respondent's contention is without merit.

STATEMENT OF FACTS

There are several inaccuracies in respondent's statement of facts. On page 3 of her brief she refers to the final report in the estate of James Goodlet and purports to set out its recitals. That report is not in evidence and its contents are not in the record, and repondent's recital of its contents is not correct.

Respondent further states, on page 3

> "Martha Goodlet as guardian transferred absolutely" etc. the shares of stock. The guardian could transfer only such title as was devised by the will. The term "absolutely" is only respondent's argument.

On page 4 of her brief she states George L. Laux

> "took possesion of such stock as administrator of her (Lillian Laux) estate"

and that

> "he filed his final report which recited that he had transfered all of the assets of his wife's estate to himself as her sole heir"

and that such report was affirmed by a judgment of the King County Court.

The final report filed by Laux in the Lillian Laux estate is not in evidence and there is no showing of its contents.

Thus Respondent's statements have no proper place in a statement of facts. But if her statements were assumed to be correct and the report in evidence, as such administrator he could take and transfer only such as were assets of the estate. If under the terms of the will as construed by the Marion Probate Court, she took only a defeasible estate, dependent upon her having issue, her title ceased upon her death without issue and the shares were no part of her estate.

The King County Court did not consider or construe the will of James Goodlet. (Rec., p. 147, Item 15) Nor did it consider whether such shares were a part of the assets of said estate. (Rec., p. 106, Ex. 3)

Respondent on page 4 of her brief, states:

> "George L. Laux, individually and as administrator of the estate of Lillian B. Laux, were named as defendants."

The amended complaint upon which the judgment was rendered named as defendants

> "The unknown heirs of George L. Laux."
> (Rec., p. 149)

Respondent, on page 5 of her brief, states:

> "Not until Lillian died in 1942 was the question raised with respect to any qualification as to absolute ownership of such stock" * * * .

Instead of this being a fact it is only an argument. While there is no direct statement in the record respecting the kind of title each heir thought he or she held to this stock, the fact that immediately his sister died without issue Goodlet made claim to the stock, these petitioners believe, clearly refutes respondent's argument, as confirmed beliefs of forty years' standing are not so suddenly dissipated.

JUDGMENT OF THE MARION PROBATE COURT AS BINDING ON KATHERINE SIMPSON, EXECUTRIX

In respondent's contention that the judgment of the Marion Probate Court is not binding on Katherine Simpson, Executrix, she strays from fact to fancy. Her argument that the shares might be ordered sold to pay creditors, taxes, etc., is, these petitioners believe, effectually answered by the record. The record does not show any creditors or taxes or any other items of the nature suggested by respondent. These are mere creations of respondent's imagination.

The record shows Katherine Simpson is a sister and heir of George L. Laux. (Rec., p. 98) That she was appointed such Executrix after the judgment of the Marion Probate Court was rendered (Rec., p. 97, Item 14), and three years after George L. Laux died. (Rec., p. 94, Item 9)

In Grantham Realty Corporation v. Bowers (1939), 215 Ind. 672, 22 N. E. (2d) 832, on page 836, the Indiana Supreme Court said:

> "judgment cannot be attacked in a collateral proceeding by one who was a party to said judgment or *by one in privity with such a party.*"

If one who is barred by a judgment could evade such judgment by the simple expedient of creating a trustee or personal representative to represent his interests and relitigate the matter, it would entirely destroy the rule that those in privity with parties as well as the parties themselves are bound by the former adjudication and are not permitted to collaterally attack the judgment.

In support of respondent's argument that she is not bound by the judgment of the Marion Probate Court for the reason that she is a party hereto in a different capacity,

she cites American Jurisprudence, Sec. 969. But this same authority, American Jurisprudence, Vol. 30, Sec. 224, p. 957, states with respect to the general rule that parties must be such in the same capacity to be bound by a former judgment:

> "These rules have been denied application, however, where a party to one action in his individual capacity and to another in his representative capacity is in each asserting or protecting his individual rights."

Simpson, as Executrix is protecting the rights of Simpson the heir, and, therefore, comes squarely within this exception.

This Court recognized the rule above stated in Corcoran v. Chesapeake and Ohio Canal Company (1876), 94 U. S. 741.

Respondent further argues that even had Katherine Simpson, Executrix, been named a party to the suit the judgment in the Marion Probate Court would not have been binding for the reason that she, as such officer appointed by another State Court could not be required to go into a foreign jurisdiction. The argument has no application to the instant case. Katherine Simpson, Executrix, was not in existence when the judgment of the Marion Probate Court was rendered. Thus we have no such question as respondent argues. But when she came into existence later as representative of the heirs, she took the heirs' rights as she found them and was bound by the adjudication.

DECLARATORY JUDGMENT ACT

Respondent, on page 8 of her brief, makes reference to the Indiana Declaratory Judgment Act. Such Act has no application to the instant case. There is a very definite practice in the State of Indiana wherein suits are filed to

obtain construction of a will and the Marion Probate Court is by statute (Burns' 1933 Supp., Sec. 4-2916) given jurisdiction to hear and determine—

> "Complaints to construe wills."
> (Rec., p. 98, Item 17)

SUBJECT MATTER OF THE SUIT IN THE MARION PROBATE COURT

Respondent, on page 7 of her brief, states:

> "In Indiana an action to construe a will is authorized only where there is ownership of some property to be determined."

and cites in support of this statement Hawes v. Kepley (1901), 28 Ind. App. 306. Such decision does not sustain respondent's statement. The Court was therein considering a ruling on demurrer to the executor's complaint for construction of a will and which demurrer was on the ground the complaint failed to state a cause of action, and, beginning on page 310, the Court said:

> "The right of executors to obtain the construction of the will in connection with the discharge of the duties of their trust is well established. Such construction will be declared when the provisions of the instrument are ambiguous but where the will is plain upon its face, courts will not entertain a suit to construe. Baxter v. Baxter, 43 N. J. Eq. 82.
>
> "The statement that John L. Kepley was claiming $500.00 when considered in connection with the law relative to implied bequests, and the provision of the will quoted, show facts capable of creating doubts justifying a construction by the Court.
>
> "It is not shown, except by a very liberal inference, that there is any necessity for such construction. The complaint fails to aver that any fund is on hand for distribution or indeed that there will ever be any

> fund for distribution. Courts do not construe wills unless an immediate necessity therefor exists."

On page 8 of her brief respondent cites the case of Smoot v. Indemnity Insurance Company (1945), 152 Fed. (2d) 667. Petitioners respectfully submit that case has no application to the case at bar as it holds only that a personal judgment may not be obtained on notice by publication.

Respondent also cites the case of Direction, etc. v. United States Steel Corporation (1924), 267 U. S. 22. But, if we correctly understand that decision, it involved only the regularity of the transfer of the stock and did not involve any question of validity of a judgment or power or jurisdiction of a Court to construe a will.

In this connection respondent comes to the decisive factor of this suit. She renews her argument that what the Marion Probate Court was asked to do was to decide to whom the shares in question belonged and not to construe the will of James Goodlet, and, as petitioners believe, respondent pointed up her error by stating, page 10—

> "The opinion of the Circuit Court pointed out that what the respondents Carter and Goodlet were after was not James Goodlet's will. They sought certain stock certificates and accumulated dividends."

Respondent's concept and argument is that the action in the Marion Probate Court was one for the *possession* of something and unless it was an action for possession her whole concept is wrong. An examination of the record in this case shows that respondent stipulated (Rec., p. 94, Item 9)—

> "That thereafter on or about November 16, 1942, said Alfred P. Goodlet filed in the Marion Probate Court of Marion County *his complaint to construe the will of his said father James Goodlet.*"

Said Probate Court in its finding and decree (Rec., p. 112, Item 3) finds:

> "That the cause of action herein is for construction of the will of James Goodlet."

The Federal District Court, in its finding (Rec., p. 143, Item 10), states:

> "That in the month of December 1942, an action was commenced by one Alfred P. Goodlet * * * *wherein the plaintiff by his complaint sought to construe a certain will.*"

These findings and stipulation have never been questioned by respondent. Thus not only did respondent stipulate it but the Marion Probate Court and the District Court found, that the suit of Alfred P. Goodlet was one to construe the will of James Goodlet.

If the suit was one to construe such will, then the will of James Goodlet was the subject of the suit; Hughes v. Hughes (1902), 30 Ind. App. 591, 66 N. E. 763, where on page 594, the Court said:

> "The subject of the action was the will of Samuel D. Delzell. The relief demanded was primarily a construction of said will."

The will being the subject of the suit and the Marion Probate Court being the domiciliary court of the testator, and the will which had been probated in said court devised personal property, such court had jurisdiction to construe such will.

Osburn v. McCartney (1877), 121 Ill. 408, 12 N. E. 72;

Hogland v. Moore (1929), 219 Ala. 497, 122 So. 824; 40 Cyc., p. 1846.

These petitioners, therefore, respectfully submit that the argument of respondent in this respect must fail and that the decision of the Circuit Court of Appeals was error.

As we understand her contention, respondent does not contend that the Indiana Statute does not authorize notice by publication where the names and addresses of defendants are unknown, nor that such Statute was not fully complied with; nor does she contend that such notice does not give the Court jurisdiction of the parties to construe a will. She seeks only to evade such result by the argument that the suit in the Marion Probate Court was not one to construe the will of James Goodlet. Having stipulated that the suit in question was for the construction of such will, and the record clearly showing that such was the action in question, petitioners respectfully submit that respondent cannot evade the effect of such judgment by her argument that the suit was for possession of the shares in question, and not for the construction of the will.

It was the will that determined the succession of the property. The property was only an incident. When the will was construed, the succession of the property was determined. In addition to all this, the property devised by the will, being personalty, was, as shown by the authorities cited by petitioners in their petition for writ of certiorari and brief in support thereof, deemed for the purpose of descent and distribution to have had its situs at the domicile of the owner at the time of death, and within the jurisdiction of the Marion Probate Court.

Respondent, on page 9 of her brief, asserts no decision would go so far as to hold that a State Court which did not have control of the stock certificate, and which was not the state where the corporation was domiciled, could enter a final judgment in rem respecting such certificate, based

solely on service by publication, and cited the case of Calumet Trucking Company v. Young (1941), 218 Ind. 468.

No such situation as that supposed by respondent is presented in this case and the case cited does not consider any such situation and has no application to the case at Bar.

Respondent, on page 13 of her brief, cites the case of Quilliam v. Union Trust Company (1924), 194 Ind. 521, on the matter of the construction of the will by the Circuit Court of Appeals. That case states the rule as is well recognized in the State of Indiana on page 530 as follows:

> "A well-established rule in this state is that words of survivorship, used in disposing of an estate, are presumed to relate to the death of the testator, rather than the death of the first taker, and that where real estate is devised to one, in terms sufficient to give a fee-simple, and a devise over is made, conditioned upon the first taker dying without issue, the phrase 'dying without issue' is construed to refer to a death in the lifetime of the testator, *unless a contrary intention is clearly expressed.*"

A contrary intention was clearly expressed in the will of James Goodlet, as reference to the provision of Items 5 and 6 of said will clearly shows. (Rec., pp. 102, 103)

On page 12 of her brief, respondent states:

> "It was conceded that the two petitioners, Carter and Goodlet, with their sister Lillian, had treated, as their own, the stock received from their father's estate for approximately forty years."

This is error. It was not so conceded. It is true that Goodlet sold his shares of stock but only after the condition of the will, namely, that he have issue, had been fulfilled.

The Indiana Supreme Court, in the case of Essick et al. v. Caple (1891), 131 Ind. 207, on page 209 said, respecting such matter:

> "The right to sell and convey the property was suspended until the birth of a child, but after that event the absolute right to sell and convey the land existed. When that event occurred the condition ceased to exist."

With respect to any sales by Carter, the record shows that she dealt somewhat in shares of the National Malleable and Steel Castings Corporation and she had pledged the shares that she held as security for these transactions. However, the record further shows that at the time of the hearing she owned One Thousand Seven Hundred Seventy (1770) shares, approximately twice the number she received from her father's estate. (Rec., p. 120, Question and Answer 14; Rec., p. 125, Questions and Answers 8 and 9)

The record further shows that Lillian Laux had bought additional shares and had sold some shares but at the time of her death she still had not only the shares received from her father's estate but additional shares that she had received as stock dividends. (Rec., p. 104, Exhibit 2 to Stipulations)

These facts, together with the further fact that Goodlet made his claim to these shares immediately upon the death of his sister without issue, these petitioners respectfully submit, clearly refutes Respondent's contention.

ESTOPPEL AND WAIVER

No estoppel against the petitioners is shown by this record.

> "One who insists upon the act of another working an estoppel must show that he acted upon the same and

was influenced thereby to do some act which would result in an injury if the other is permitted to withdraw or deny the act."' (Dudley et al. v. Pigg (1897), 149 Ind. 371.

"Ordinarily, to constitute an estoppel by conduct, there must be: (1) A representation or concealment of material facts; (2) the representation must have been made with knowledge of the facts; (3) the party to whom it was made must have been ignorant of the matter; (4) it must have been made with the intention that the other party should act upon it; and (5) the other party must have been induced thereby to act." Pierce v. Vansell (1903), 35 Ind. App. 527, 533.

In the case at Bar there is no showing that Simpson, Executrix, or any of the heirs of George L. Laux, or George L. Laux, were in any manner influenced by any alleged act of either Goodlet or Carter. Neither the Executrix, nor Laux, nor any of the heirs ever did anything to acquire these certificates; they, so to speak, simply fell in their laps.

With respect to laches, no claim could be made to the shares held by Lillian Laux until she died without issue. Immediately upon her death Goodlet presented his claim and within less than six months filed his suit to construe the will. (Stipulation No. 9, Rec., p. 94)

"A court of equity will not take jurisdiction of a suit for the construction of a will unless it can afford immediate relief. It will not undertake, where there is no matter in dispute, to determine future rights, nor will it ever undertake to decide upon and determine contingencies which may never arise."
40 Cyc., p. 1846.

WHEREFORE, these petitioners respectfully submit that this Court does have jurisdiction under the record before it, and that the decision of the Circuit Court of

Appeals was erroneous, and that questions of great general importance are presented, and this Court's writ of certiorari should issue to the United States Court of Appeals for the Seventh Circuit as heretofore prayed by petition.

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